



**National Trust for
Historic Preservation**
Save the past. Enrich the future.

June 15, 2017

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: WT Docket No. 17-79 and 15-180
Accelerating Wireless Broadband Deployment By Removing Barriers to
Infrastructure Investment
Revising the Historic Preservation Review Process for Wireless Facility Deployments

Dear Ms. Dortch:

These comments are filed on behalf of the National Trust for Historic Preservation, in response to the Notice of Proposed Rulemaking published in the Federal Register on May 10, 2017, 82 Fed. Reg. 21,761.

Interests of the National Trust for Historic Preservation

The National Trust for Historic Preservation in the United States is a private nonprofit organization chartered by Congress in 1949 to facilitate public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 54 U.S.C. § 312102(a). With more than one million members and supporters around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition, the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation (ACHP), which is responsible for working with federal agencies to implement compliance with Section 106 of the National Historic Preservation Act (NHPA). *Id.* §§ 304101(8), 304108(a).

The National Trust was directly involved as a consulting party, and was an active member of the Telecommunications Working Group that consulted with the Federal Communications Commission (FCC) for years to develop both the Programmatic Agreement for the Collocation of Wireless Antennas (2001) ("Collocation PA"), and the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Reviewed by the FCC (2004) ("Nationwide PA"). The Working Group also included the ACHP, the National Conference of State Historic Preservation Officers (NCSHPO), tribal representatives, and industry representatives, all involved as stakeholders in developing the PAs. The National Trust also submitted comments directly to the FCC during the FCC's consideration of the draft and final PA.

General Comments

The FCC's Nationwide PA and Collocation PA have long been considered models for other agencies seeking programmatic efficiencies for compliance with Section 106 of the National Historic Preservation Act. Indeed, just within the last month, the ACHP adopted a program comment authorizing and encouraging other federal agencies to make use of the long-standing success of the FCC's programmatic approach in order to streamline deployment of broadband infrastructure projects on public lands managed by a whole variety of federal agencies. 82 Fed. Reg. 23,818 (May 24, 2017). The FCC's suggestion that it may consider dismantling this entire compliance mechanism would not only create enormous uncertainty and inefficiencies for its own licensees, but would also call into question the compliance of other federal agencies who will now be relying on the FCC's long-standing approach to compliance.

We agree with the comments of NCSHPO that the FCC's current Notice of Proposed Rulemaking appears to have been developed based almost entirely on input from industry representatives, rather than based on consultation with a balanced working group that includes the expertise of a variety of stakeholders. We urge the FCC to engage in broad consultation with such a working group. We also agree with the earlier comments of the ACHP that many of the conclusions presented in the NPRM are overly broad, and that some of the assumptions on which the NPRM is based seem to contradict Administration policies on federalism (ACHP letter to FCC, April 13, 2017).

Tribal Fees

A great deal of attention has been focused on controversial allegations regarding the fees charged by tribal nations to review applications in order to determine whether the proposed infrastructure has the potential to adversely affect historic properties of significance to the tribe. In general, the National Trust's view is that the tribes are being used as scapegoats, and the FCC's suggestion that it may unravel the current approach to Section 106 compliance is an overreaction. A much better solution would be for the FCC to step up to the plate and take more responsibility for managing its tribal notification system in a manner that would reduce or eliminate abuse. Other federal agencies manage to facilitate tribal consultation for undertakings that involve non-governmental applicants, and they are able to do so in a way that avoids the rumored abuses involved in the FCC's approach. For example, the Department of Housing and Urban Development (HUD) has a system called the Tribal Directory Assessment Tool (TDAT) (<https://egis.hud.gov/tdat/Tribal.aspx>), which is a transparent directory that enables members of the public to look up exactly which tribes have identified a cultural connection to each specific area (by county within each state). HUD staff contacted each tribe directly to verify which geographic areas were of interest to the tribe. By contrast, the lack of transparency in the FCC's system could invite geographic overreaching by keeping it hidden from review.

Delays

The FCC's allegations that SHPO and tribal reviews are causing delays are directly contradicted by the specific data submitted in numerous comment letters to the FCC from

SHPOs and tribes. The Nationwide PA includes a 30-day review period, and it appears that the FCC is failing to enforce that provision.

Exclusions for Small Facilities

In general, we do not believe that the FCC can defensibly rely on 36 C.F.R. § 800.3(a)(1) as the basis for developing the exclusions discussed in this section, because it is simply not appropriate to conclude that these activities have “no potential” to cause effects on historic properties. Instead, if modifications to these existing exemptions are made, or other exemptions are adopted, the FCC should use other program alternatives to do so.

(i) Pole Replacements.

Instead of having the exemption encompass replacement poles that are “not substantially larger” than the existing pole, we would support an exemption for replacement poles that are actually *smaller* than the existing pole, in both height and diameter (provided that the existing pole was properly reviewed under Section 106), in order to create an incentive to maximize the use of those improvements in technology.

(ii) Rights-of-Way.

We oppose the option of extending the right-of-way exemption to allow its use within historic districts or areas. This would include roads within historic districts and cultural landscapes, and rights-of-way where the corridor itself is historic, such as scenic byways. There is simply too much potential for adverse effect, and it would be virtually impossible to develop formulaic rules (e.g., regarding height or proximity or installation method) that could reliably protect against those adverse effects. Instead, improvements in technology should be applied to engage in Section 106 consultation for the deployment of this less intrusive infrastructure and equipment within historic rights-of-way, since numerous alternatives can be developed that will avoid and minimize the adverse effects on a case-by-case basis.

(iii) Collocations.

The evolution of telecommunications technology, and the increasing use of equipment that is smaller and more closely spaced than in the past, will mean that the Collocation PA will play a more important role than ever in the future, by dramatically expediting compliance for new antennae that can be installed on existing structures. We hope that the FCC will promote and encourage its further use. However, we do not support the proposed exemption of review for structures that are located between 50 and 250 feet from the boundary of any historic district. Those collocations that meet the criteria established for small wireless antennas *are* already exempted within this buffer zone, which serves as an incentive to design new infrastructure in a way that would fit within the existing exemption. We recommend that the FCC retain that incentive.

The National Trust also supports the use of historic buildings and structures themselves for the installation of telecommunications infrastructure. When historic collocation is done in a

way that is sensitive and compatible, collocation of this equipment can help to fund the restoration and maintenance of historic properties. *See, e.g.,* <https://vtdigger.org/2017/06/07/landmark-brattleboro-steeple-may-become-cell-tower>. At the same time, collocation minimizes the need to build new structures such as cell towers that have adverse visual effects. However, it is important to ensure that such collocation proposals are reviewed by state and/or tribal historic preservation offices to confirm that they are designed in a manner that avoids and minimizes any visual and physical harm to the historic property.

We do *not* recommend that the FCC pursue the proposal to allow collocations approved by a Certified Local Government (CLG) to substitute for SHPO Review. The CLG program does not enforce minimum standards for the review of historic preservation issues by local governments, and the reliance on these local reviews would substantially increase the risk that applicants would be subject to inconsistent and unpredictable decisions.

Twilight Towers

We support the development of a mechanism that could bring twilight towers into compliance with Section 106 retroactively, so that they can be used in the future for collocation. However, that mechanism should not be based on a retroactive exemption for these structures from Section 106 compliance. While certain alternatives may be foreclosed in the context of retroactive review (e.g., the “no-build” alternative), there may nonetheless be ways to minimize or mitigate the adverse effects of a twilight tower (if any). Therefore, the preferred approach would be a special Section 106 review for the twilight tower itself, with an emphasis on minimizing and mitigating any adverse effects, which would then leave the tower authorized for use under the Collocation PA.

We note the FCC’s comment that “the vast majority of towers that have been reviewed under the NPA have had no adverse effects on historic properties, and the Commission is aware of no reason to believe that Twilight Towers are any different in that regard.” 82 Fed. Reg. at 21,770 (col. 3). If this is indeed the case, then there is every reason to believe that the “vast majority” of twilight towers subject to retroactive Section 106 review would be deemed to have “no adverse effects,” and could be expeditiously approved and put into service as structures eligible for use under the Collocation PA.

Conclusion

The FCC’s regulatory approach to ensuring compliance with Section 106 of the NHPA was specifically upheld in federal court more than a decade ago, in response to challenges from the telecommunications industry. *CTIA v. FCC*, 466 F.3d 105 (D.C. Cir. 2006). We urge the FCC *not* to dismantle this well-established framework for compliance, but instead to work with stakeholders to develop narrowly tailored refinements that can respond to discrete and documented problems, rather than overreacting to unsubstantiated allegations. The National Trust would welcome the opportunity to participate in a collaborative consultation process to develop approaches to future compliance with Section 106 that are based on consensus among stakeholder groups. We appreciate the opportunity to comment, and we look forward to further consultation on these issues.

Sincerely,

A handwritten signature in black ink, reading "Elizabeth Merritt". The script is cursive and fluid, with the first name and last name clearly distinguishable.

Elizabeth S. Merritt
Deputy General Counsel